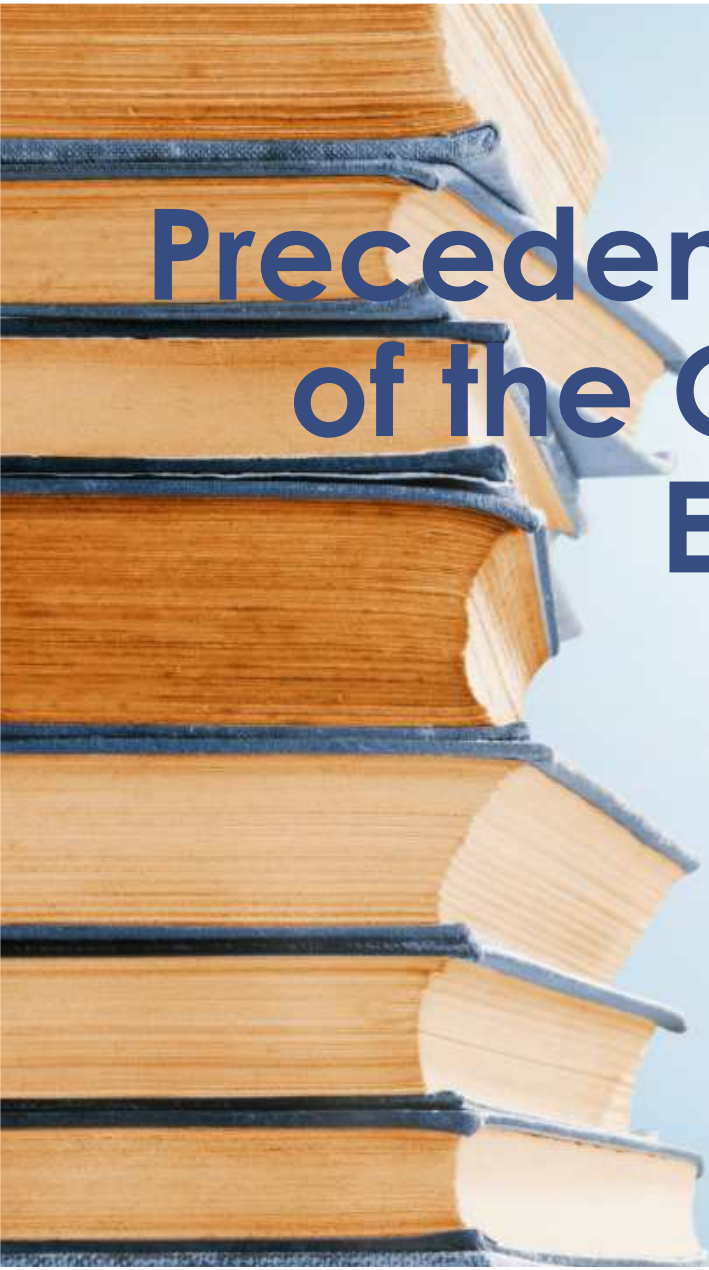

Precedential effect of judgments of the Court of Justice of the European Union

Łukasz Stępkowski
PhD Candidate, Chair of Int'l and European Law
University of Wrocław, Poland
Junior Advocate at Wrocław Bar Association

Court of Justice of the EU

- The EU's judicial organ and one of seven EU institutions, commonly abbreviated as the CJEU
- Composed of three courts, of which there are, in order of superiority from highest instance to lowest :
  - The Court of Justice (formerly the European Court of Justice, or the ECJ)
  - The General Court (formerly the Court of First Instance, or the CFI)
  - The Civil Service Tribunal (which hears only EU staff cases and in all practicality is a labour court)

Precedents – a working definition

- **„Precedent" :**
  - **1. 'the making of law by a court in recognizing and applying new rules while administering justice'**

  or

  - **2. 'a decided case that furnishes a basis for determining later cases involving similar facts or issues'**

  (as per Black's *Law Dictionary*, 9e, 2009, under 'precedent').

  In the first sense, precedent is equated with judicial lawmaking (or „case-law").

  In the second sense, a precedent is a ruling can be either binding (authoritative, in that a court following a given case must follow) or persuasive, which can be followed due to its insight and rationale, yet it is not compulsory to do so.

The „common law" and „civil law" divide

- A „common law" country, like the United Kingdom of Great Britain and Northern Ireland, recognizes the ability of the court to lay down general rules of law
- Conversely, in a „civil law" country (like the Republic of Poland or – as far as I know – the Russian Federation) a court is not allowed to create law; instead, it is meant only to adjudicate on legal disputes; a court's judgment does not formally constitute a source of law *per se*
- However, as any advocate or a judge in a civil law jurisdiction may attest, higher courts' decisions are often cited and followed for their interpretative value regardless of their legal status

The legal order of the European Union

- The law of the European Union (or „the *acquis*"), given that it is not the law of a nation-state, but a law of an international organization, exhibits some unusual properties in that it is a mix of written and unwritten law
- Therefore, it can be surmised that the law of the EU is a hybrid of civil and common law concepts
- That legal order, being able to attain direct effect, mixes with national legal orders of the EU Member States; by virtue of this (and the supremacy of EU law when two norms – EU and national – conflict) even strictly civil law jurisdictions within the EU are subjected to a „common-law" element

Is the CJEU involved in any precedents and why would be important?

- Yes, indeed it is – the CJEU both creates precedents which are deemed case-law in the first sense of the word and is involved in precedents in the second sense of the word, as it can bind itself with a ruling when hearing an appeal from a lower court in it.
- Moreover, the CJEU's rulings have at least a persuasive, and in some cases, binding nature for national courts of Member States.
- Given that the *acquis* penetrates and shapes national legal orders of all 28 EU Member States (some of which are staunchly „positivist" as to their legal system, like France or, at least in part, Poland), the precedential influx of the CJEU's work changes the very nature of a national legal system – a reasonably important effect indeed.

Key areas in which precedents of either kind appear

- General principles of law of the European Union
- Legal cases where there is a *lacuna* and the Court is called to fill in the legal gap
- Opinion of the Court on a draft of an international agreement to which the EU may be party
- Cases decided by extended compositions of the CJEU (especially by a Full Court composition), even more so if issued in a preliminary ruling procedure
- Rulings on appeal by Court of Justice, where a ruling of the General Court is challenged

The normative status of the Court's jurisprudence

- There is no textual indication in the EU's constitutional Treaties as to what place (if any) do the Court's judgments occupy in the legal system of the European Union
- However, the general principles of law of the European Union – a formal *and unwritten* source of EU law – are accorded rank of primary law by article 6 of the Treaty on European Union (that is, supreme rank, hierarchically above secondary EU legislation and on par with constitutional Treaties); it is the Court that pronounces these principles into the legal order of the European Union
- Moreover, the Court itself has ruled that a manifest breach of its jurisprudence engages State liability in damages (case C-224/01, judgment of the Court of 30 September 2003 *Gerhard Köbler v Republik Österreich*, p. 56, Case C-173/03 judgment of the Court of 13 June 2006 Traghetti del Mediterraneo SpA, in liquidation v Repubblica italiana pp. 42-44).

General principles of law of the EU

- Alluded to in article 6 TEU, which states that fundamental rights have such status
- Not limited to fundamental rights, but the latter constitute an example of them
- Declared into being by the Court; after being declared as a general principle, a norm constitutes a formal source of law; therefore it cannot be omitted or excised from the EU legal system, only further explained; therefore, they constitute an example of a precedent in a primary sense
  - The Court can refuse to declare a general principle as extant (Case C-101/08 judgment of the Court of 15 October 2009 *Audiolux SA et al. v Groupe Bruxelles Lambert SA (GBL) et al.*)
- As such, they bind the EU as an organization and Member States when there is a link to EU law (Case C-427/06, judgment of the Court (Grand Chamber) of 23 September 2008 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, Case C-617/10, judgment of the Court (Grand Chamber) of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*)

Lacunae and the Court's case-law

- The Court can „patch" gaps in law in its jurisprudence, therefore negating a *lacuna* – by substituting its interpretation where no law exists
- The Court did so eg. when it interpreted article 263 of the Treaty on the functioning of the European Union (TFEU, the second constitutional EU treaty) on the term of „regulatory acts", of which there is no legal definition anywhere in the Treaties (Case C-583/11 P: Judgment of the Court (Grand Chamber) of 3 October 2013 — *Inuit Tapiriit Kanatami and Others v European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission*, on appeal)

Opinions of the Court on drafts of international agreements

- **Art. 288 TFEU : To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (…) Recommendations and opinions shall have no binding force.**
- **Art. 218 para. 11 TFEU : A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.**
- **Enhanced force of the Court's opinion : an opinion (a „soft law") rendered binding; given that an opinion is a legal act, this is an example of the Court setting a precedent in the first sense as well.**

„Extended" compositions of the Court

- Traditionally, in common law jurisdictions (or even sometimes in civil law jurisdictions) , the judiciary decides difficult, important or controversial cases in compositions greater than usual, and the Court of Justice of the EU is no different
- The composition alone creates an example of an interpretative (persuasive) precedent in a second sense of the term
- Of 28 judges of the Court, it can sit in a Grand Chamber composition (13 judges in principle, min. 9 judges) or a Full Court (min. 15 judges); the General Court can rule in a Grand Chamber composition of 13 judges (min. 9).
- The greater the composition, the more authoritative the interpretation
- Sometimes, the Court is either required by Statute or enabled by referral to sit as Full Court
  - That is, the Court rules in full composition in accordance with Article 245(2), Article 247 or Article 286(6) of the TFEU. Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Appeals to the Court of Justice from the General Court's ruling

- An example of a precedent is a second sense - a „binding" precedent
- Statute of the CJEU, art. 61 : „Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law".
- Consequently, the General Court is barred from interpreting EU law differently than the Court of Justice (as could have been seen in the famous *Kadi* line of cases - Joined Cases C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber) of 3 September 2008 *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council et al.*), after and due to which the General Court was forced to abandon its earlier, monistic approach to international law in favour of an effectively dualist one advocated by the Court of Justice

The Court's approach to its' jurisprudence

- The common academic understanding is that the Court is not bound by its' own jurisprudence but does not often depart from it (Arnull, *The EU and its Court of Justice*, OUP, 2006, p. 627)
- Moreover, the CJEU does not differentiate between a *ratio decidendi* and *obiter dictum*, treating its judgment as a whole (Beck, *The Legal Reasoning of the CJEU*, Hart, 2012, p. 249)
- The Court is likely to use its own jurisprudence to further a legal argument; it is to be expected that it would cite an earlier case when deciding another or even immediately cross-cite a case that has been decided at a same day (eg. *Hans Åkerberg Fransson* and case C-399/11 *Stefano Melloni v. Ministerio Fiscal*, both decided on 26th of February 2013)

The CJEU and overruling earlier precedents

- The Court – if it considers it appropriate - may engage in reshaping its case-law in several ways :
  - Express overruling : where there were no change of law, but the Court considers that it must wholly depart from an earlier decision (eg. judgment of the Court of 17 October 1990 SA CNL-SUCAL NV v HAG GF AG (HAG II))
  - Revision : where there was a change in law and the Court wishes to reflect it in its jurisprudence (eg. Cases C-163,165,250/94 *Sanz de Lera,* where the freedom of capital was found to be directly effective due to TEU amendments)
  - Distinguishing : where a case is deemed to be similar to an earlier one, but the Court does not wish to follow that eariler decision(s) for a factual or a legal reason (eg. L
  - Extension or restriction : where the Court wishes to further interpret an already established rule either expansively or in a more stringent manner, but does not negate it altogether (eg. the EU citizenship cases of *Zambrano, McCarthy, Dereci and Iida*)
- If a change is not in order, the Court would affirm its case-law

The Court and the national courts

- The CJEU has positioned itself in the centre of the EU legal system, but national courts of Member States are also part of it and there is a separation of powers between national judiciaries and the CJEU
- The courts can use the CJEU's jurisprudence as a guidance; a manifest breach equates with breach of EU law itself
- Given the doctrine of *acte éclairé*, the Court will follow its earlier case-law if a national court asks of its guidance in a case that is identical or sufficiently similar to one already decided (joined cases 28–30/62, judgment of the Court of 27 March 1963 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*)

Preliminary ruling procedure

- The CJEU and national courts all over the EU engage in a judicial dialogue, the normative basis of which is the preliminary ruling procedure regulated by Article 267 TFEU
- A preliminary reference may – and, in a case of a court from whose rulings there is no appeal, must – be made by a national court adjudicating a case when there is a need to interpret the law of the EU or a concern of validity of an EU legal act
- The preliminary ruling procedure serves as an example of an authoritative precedent, because a national court which normally must refer a case to the CJEU may rely on a previous case and refrain from making a reference where, after taking into account the characteristics of EU law (*acte clair*) :
  - The question is irrelevant to the conclusion,
  - The question has already been interpreted,
  - The correct interpretation is so obvious that it leaves no scope for any reasonable doubt

Case 283/81 Judgment of the Court of 6 October 1982. - Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health

Thank you for your attention